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IN THE

Supreme Court of the United States

October Term, 1959

No. 325

BARON DE HIRSCH MEYER, LEONARD L. ABESS and SAM R. BECKER,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	PAGE
A. The Opinions Below	1
B. Grounds on Which Jurisdiction of This Court is Invoked	2
C. Questions Presented	2
E. Statement of the Case	5
H. Reasons for Granting the Writ	8
POINT I—The Court of Appeals did not have jurisdiction of the appeal as to Count One	9
POINT II—Shopping for favorable grand juries should be prohibited	12
POINT III—Counts Two through Ten are insufficient	15
POINT IV—Counts Eleven and Twelve are insufficient	19
POINT V—Counts Thirteen through Seventeen are insufficient	22
POINT VI—Counts Eighteen through Twenty-one are insufficient	24
POINT VII—Count One is insufficient	25
Conclusion	29

PAGE

Appendix A 1a

Appendix B 4a

Appendix C 27a

Cases Cited

Berger v. United States (1935), 295 U. S. 78 14

Costello v. United States (1956), 350 U. S. 359 13

Fawcus Machinery Company v. United States (1931), 282 U. S. 375 28

Fourco Glass Co. v. Transmirrer Prod. Corp. [1957], 353 U. S. 222 24

W. George Kennedy v. United States, No. October Term, 1959 5

Ladner v. United States [1958], 358 U. S. 169 ..... 21, 25

McNabb v. United States (1943), 318 U. S. 332 12

Mesarosh v. United States (1956), 352 U. S. 1 12

Morgan v. Commissioner [1940], 309 U. S. 78 23

Palermo v. United States [1959], — U. S. —, 3 L. Ed. 2d 1287 24

United States v. Atlantic Refining Co. (1959), — U. S. —, 3 L. Ed. 2d 1054 28

United States v. Borden (1939), 308 U. S. 188 ..... 8, 9, 10

United States v. Britton (1883), 107 U. S. 655 8

United States v. Britton (1883), 108 U. S. 193 ..... 8, 18, 19

United States v. Britton (1883), 108 U. S. 199 ..... 7, 8, *passim*

United States v. Hark (1944), 320 U. S. 531 11

United States v. Hvass (1958), 355 U. S. 570 ..... 8, 9, 10

United States v. Matsinger (C. A. 3d Cir. 1951), 191 F. 2d 1014 27

PAGE

United States v. Mersky (1958), 261 F. 2d 40, question of jurisdiction postponed (1959) 359 U. S. 951 ..... 8, 11, 12

Van Espoel Real Estate Co. v. Sarasota Milk Co. [1930], 100 Fla. 438 22

STATUTES AND RULES

Federal Rules of Criminal Procedure:
Rule 7 (c) 3, 4

Fla. Stats. [1957] §695.01 22

United States Code:
Title 12, §221a (b) 48 Stat. 162 ..... 4, 15
Title 12, §371c, 48 Stat. 183 ..... 4, 16, 25
Title 12, §§1462[a], 1464[a] 28
Title 12, §1464 (c), 48 Stat. 132 4
Title 12, §1464 (c) 3, 22
Title 12, §1467(c), 48 Stat. 734 24
Title 18, §371, 62 Stat. 701 ..... 4, 16
Title 18, c. 645, 62 Stat. 683 3
Title 18, §§656, 657 ..... 2, 3, *passim*
Title 18, §1006 ..... 3, 4, *passim*
Title 18, §3731 2
Title 18, §3731, 62 Stat. 844, 63 Stat. 97 ..... 4, 9
Title 28, §1254 (1) 2

United States Constitution:
Amendment V 4
Amendment VI 4

OTHER AUTHORITIES

Study of Banking Laws: Legislative Recommendations of the Federal Supervisory Agencies to the Committee on Banking and Currency, United States Senate (Government Printing Office, 1956), pp. 147, et seq. 27

Webster's New Collegiate Dictionary (1956), p. 217 20

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

A. The Opinions Below.

The opinion of the United States District Court for the Southern District of Florida granting petitioners' motion to dismiss the indictment herein has not been reported, and is printed in "Appendix A" hereto. The opinion of the Court of Appeals for the Fifth Circuit reversing the order of the District Court (RIVES, *J.*, dissenting as to fourteen counts) is reported in 266 F. 2d 747, and is printed in "Appendix B" hereto.

B. Grounds on Which Jurisdiction of This Court is Invoked.

1. The judgment of the Court of Appeals sought to be reviewed was dated and entered on the 5th day of May, 1959.

2. Rehearing was denied by the Court of Appeals by order dated the 20th day of July, 1959. No extension of time to petition for certiorari has been requested or granted.

3. The statutory provision believed to confer jurisdiction on this Court to review the judgment in question by writ of certiorari is 28 U. S. C. 1254 (1).

C. Questions Presented.

1. Did the Court of Appeals have jurisdiction, under 18 U. S. C. §3731, of the appeal from so much of the order of the District Court as granted petitioners' motion to dismiss Count One of the indictment upon the ground that the acts therein charged did not constitute criminal misapplication of funds within the meaning of 18 U.S.C. §§ 656 and 657?

2. Is it proper for a United States Attorney, after two grand juries, sitting in the County where the acts constituting the alleged crimes occurred, have failed to indict, to submit the same acts to a third grand jury sitting 250 miles away, in a community of a completely different character?

3. Does the making of loans by a member bank of the Federal Reserve System to a corporation whose stock is wholly owned by another corporation having common directors with the member bank, as alleged in Counts Two

through Ten of the indictment herein, constitute a criminal misapplication of the funds of the member bank in violation of 18 U. S. C. §656?

4. In said Counts it is alleged that petitioners acted "without disclosing to said bank" certain facts, but such facts are not explicitly alleged. Said Counts contain such conclusory allegations as "without requiring adequate security" and "at a low rate of interest." In view of the foregoing, do these Counts satisfy the requirement of Rule 7 (c) of the Federal Rules of Criminal Procedure that indictments contain "a plain, concise and definite written statement of the essential facts constituting the offense charged"?

5. Does 18 U. S. C. §1006 prohibit deception of persons other than organizations and agencies therein named and representatives of such organizations and agencies?

6. Does 12 U. S. C. §1464 (c) prohibit loans by federal savings and loan associations secured by mortgages on land which is subject to prior unrecorded mortgages, where, under applicable State law, such unrecorded mortgages are junior to the associations' mortgages and is the making of such loans a criminal misapplication within the meaning of 18 U. S. C. §657?

7. Where the Reviser's Note in connection with the codification of Title 18 of the United States Code by the Act of June 25, 1948, c. 645, 62 Stat. 683, states that sections of prior law are condensed "without change of substance," does an act not prohibited by prior law become criminal under the codification?

8. Is indirect self-dealing by officers and affiliates of federal savings and loan associations as alleged in Count One of the indictment herein, a violation of 18 U. S. C. §§657 and 1006?

9. When a bank or savings and loan association makes loans at interest, is it thereby deprived of the money, so as to constitute the prohibited misapplication, within the meaning of 18 U. S. C. §656?

D. Statutes and Rules Involved.

The statutes and rules involved are:

1. United States Constitution, Amendment V;
2. United States Constitution, Amendment VI;
3. 12 U. S. C. §221a (b), 48 Stat. 162;
4. 12 U. S. C. §371c, 48 Stat. 183;
5. 12 U. S. C. §1464 (c), 48 Stat. 132;
6. 18 U. S. C. §371, 62 Stat. 701;
7. 18 U. S. C. §656, 62 Stat. 729;
8. 18 U. S. C. §657, 62 Stat. 729, 63 Stat. 90, 70 Stat. 714;
9. 18 U. S. C. §1006, 62 Stat. 750, 63 Stat. 92, 70 Stat. 714;
10. 18 U. S. C. §3731, 62 Stat. 844, 63 Stat. 97;
11. Rule 7(c) Federal Rules of Criminal Procedure.

The pertinent portions of all the foregoing are set forth in "Appendix C" hereto.

E. Statement of the Case.

Petitioners herein, together with W. George Kennedy (petitioner in No. , October Term, 1959) were the subjects of a 21-count indictment handed down on February 14, 1958 by a federal grand jury sitting in Tampa, Florida. It is alleged by petitioners and not denied by respondent that the same facts had previously been submitted to two grand juries sitting in Miami, Dade County, Florida, and that such grand juries had failed to indict (135-140).* All the overt acts alleged in the conspiracy count and all the acts alleged in the substantive counts occurred in Dade County, Florida. It further appears that all the corporations mentioned in the indictment have their principal places of business in Dade County, and that all the petitioners and the persons with whom the alleged transactions occurred reside in such County (135).

The indictment charges misconduct by petitioners as directors and officers of (a) banks which were members of the Federal Reserve System or insured by the Federal Deposit Insurance Corporation or both, and (b) of a federal savings and loan association.

Count One of the indictment (1-13) purports to allege a conspiracy to violate 18 U. S. C. §§656, 657 and 1006, by making improper loans and false entries. There is no allegation of any ultimate loss to the financial institutions as a result of the conspiracy.

Counts Two through Ten of the indictment (13-21) are substantially identical. Each alleges a loan by North Shore

* Parenthetical references, unless otherwise indicated, are to pages of the record in the companion case of *W. George Kennedy* v. *United States*, No. , October Term, 1959.

Bank, a member of the Federal Reserve System, to a corporation wholly owned by Federal Title and Insurance Corporation, of which petitioners were stockholders and directors. It is alleged that a majority of the directors of Federal Title were directors of North Shore Bank, but it is not alleged that the latter and the borrowers had common directors. It is alleged that each loan was made "without requiring adequate security, ... at a low rate of interest [and] . . . . in violation of sound banking practice. . . . ." None of these terms is further explained or particularized in the indictment. Again no loss to the Bank is alleged. It is alleged that by causing the Bank to make such loans petitioners misapplied its funds in violation of 18 U. S. C. §656.

Counts Eleven and Twelve (31-35) allege that petitioner Becker made false reports to examiners of the Home Loan Bank Board and of the Federal Home Loan Bank Board in violation of 18 U. S. C. §1006. Again, no resultant loss is alleged.

Counts Thirteen through Seventeen (35-45) allege that petitioners misapplied the funds of Miami Beach Federal Savings and Loan Association, in violation of 18 U. S. C. §657, by causing it to make loans on the security of mortgages on real property which was subject to unrecorded mortgages held by Federal Title and Insurance Corporation; the existence of these unrecorded mortgages were not disclosed to Miami Beach Federal Savings and Loan Association. Again, no loss to the latter is alleged.

Counts Eighteen through Twenty-one (45-48) allege that petitioners, being officers of Miami Beach Federal Savings and Loan Association, participated indirectly through Fed-

eral Title in relatively small portions of specified loans made by the Association, in violation of 18 U. S. C. §1006. The relationship of petitioners and Federal Title to the various borrowers is not alleged. The manner in which petitioners and Federal Title participated in the loans is not alleged. Again, no loss to the lender is alleged.

Petitioners moved to dismiss each count for failure to state facts sufficient to make out a violation of criminal law (87-99). They also moved to dismiss the indictment because of the finding of the indictment in Tampa after two grand juries in Miami failed to indict (135-140, 150-156).

The District Court dismissed the entire indictment (112). It dismissed Count One upon the ground that the acts therein charged did not amount to criminal misapplication within the meaning of 18 U. S. C. §§656 and 657, as construed in *United States* v. *Britton* (1883), 108 U. S. 199 (111). It dismissed the other counts on the ground of duplicity (110-111).

The prosecutor appealed from the order of dismissal to the Court of Appeals (112-113). Petitioners moved the Court of Appeals to certify to this Court so much of the appeal as involved the dismissal of Count One, the conspiracy charge (266-268d).* The Court of Appeals held that it had jurisdiction of the entire appeal (266 F. 2d 747, at p. 754). It held all the counts sufficient (RIVES, *J.*, dissenting as to Counts Two through Ten and Thirteen through Seventeen, *id.* at pp. 754-760). It held that there was no duplicity as to Counts Two through Twenty-one (*id.*, at p. 755), but

* The propriety of indictment in Tampa was also argued in the Court of Appeals. See appellant's reply brief, pp. 6--7.

that it could consider other objections to these counts (*id.*, at p. 756), under the rule that "A successful party in the District Court may sustain its judgment on any ground that finds support in the record." (*Jaffke* v. *Dunham* [1957], 352 U. S. 280.) Petitioners do not here urge the claim of duplicity.

H. Reasons for Granting the Writ.

Petitioners respectfully submit that a writ of certiorari should be granted herein (a) because the decision of the Court of Appeals for the Fifth Circuit herein, concerning its jurisdiction of the appeal is in conflict with the decisions of this Court in *United States* v. *Hvass* (1958), 355 U. S. 570, and *United States* v. *Borden* (1939), 308 U. S. 188, 193, and with the decision of the Court of Appeals for the Second Circuit in *United States* v. *Mersky* (1958), 261 F. 2d 40, question of jurisdiction postponed (1959) 359 U. S. 951; (b) because the decision of the Court of Appeals herein has sanctioned a departure below from the accepted and usual course of judicial proceedings, in permitting the finding of an indictment in Tampa after two grand juries in Miami had failed to indict, which calls for the exercise of this Court's power of supervision over the lower federal courts; (c) because in sustaining some counts of the indictment the Court of Appeals has decided important questions of federal law which have not been, but should be, settled by this Court; and (d) because in sustaining other counts the Court of Appeals has decided questions of federal law in a manner which is in conflict with the decisions of this Court in *United States* v. *Britton* (1883), 107 U. S. 655; *United States* v. *Britton* (1883), 108 U. S. 193; and *United States* v. *Britton*, *supra*, 108 U. S. 199.

POINT I

The Court of Appeals did not have jurisdiction of the appeal as to Count One.

It is well settled under 18 U. S. C. §3731

(a) that an appeal lies to this Court from a decision of the District Court dismissing an indictment

> "When the District Court holds that the indictment, not merely because of some deficiency in pleading but with respect to the substance of the charge, does not allege a violation of the statute upon which the indictment is founded, that is necessarily a construction of that statute" (*United States* v. *Borden Co.*, [1939] 308 U. S. 188, 193, quoted by Mr. Justice Whitaker in *United States* v. *Hvass*, [1958] 355 U. S. 570, 574);

(b) that an appeal lies to this Court from a decision of the District Court "sustaining a motion in bar, when the defendant has not been put in jeopardy; and

(c) that no appeal lies to the Court of Appeals from a decision concerning a count of an indictment when a direct appeal lies to this Court.

We respectfully submit that the decision of the District Court herein as to Count One was based on its view that the acts therein alleged did not constitute criminal misapplication in violation of 18 U. S. C. §§656 and 657, as the predecessor of §656 was interpreted by this Court in *United States* v. *Britton*, *supra*, 108 U. S. 199. The District Court pointed out that not every illegal use of bank funds was a misapplication within the meaning of §§656 and 657, and

that maladministration was not necessarily criminal misapplication. That was the essence of the holding of this Court in the *Britton* case *supra*, 108 U. S. 199. On the authority of that case, the District Court held that the acts alleged in Count One "do not amount to criminal misapplication of moneys or funds, although they may raise the question of maladministration" (111).

We submit that such a holding comes directly within the rule enunciated in the *Borden* and *Hvass* cases, *supra*, that a direct appeal lay therefrom to this Court, and that accordingly the Court of Appeals lacked jurisdiction of the appeal as to Count One.

The Court of Appeals wrote as follows (266 F. 2d, at p. 754):

> ". . . at this late date no substantial question can be raised but that the words 'wilfully misapplies' as used in Sections 656 and 657 of Title 18 United States Code, mean a criminal misapplication rather than a mere act of maladministration. United States v. Britton, 1883, 108 U. S., 199, 206, 2 S. Ct. 531, 27 L. Ed. 698. As said in the earlier Britton appeal, 1882, 107 U. S. 655, 668, 2 S. Ct. 512, 523, 27 L. Ed. 520, 'it must be a wilful misapplication for the use or benefit of the party charged, or of some person or company other than the association, with intent to injure and defraud the association or some other body corporate, or some natural person.' An appeal to the Supreme Court is not needed to have repeated this long-settled construction of the term 'wilfully misapplies.'"

There are, we respectfully submit, two answers to this. In the first place, whether or not a direct appeal lies under

§3731 depends, not on the "need" for a decision by this Court, but rather on whether the decision below comes within the scope of that section. There is nothing in that section comparable to the discretionary power to grant certiorari. Secondly, the issue herein is not merely whether mere acts of maladministration are criminal misapplications. The issue is whether the specific acts alleged in the indictment herein amount to maladministration or criminal misapplication. That issue has not heretofore been determined, except insofar as the *Britton* cases, *supra*, hold that at least some of the acts alleged herein are not criminal.

Another way of looking at the decision of the District Court as to Count One is to consider it one "sustaining a motion in bar". In *Mersky* v. *United States*, *supra*, 261 F. 2d 40, the Court of Appeals for the Second Circuit had before it an appeal from a decision dismissing an indictment upon the alternative grounds that the acts alleged did not constitute a violation of the applicable regulations and that such regulations were too vague to support a criminal prosecution. That Court held that the appeal was one from a motion in bar, which lay only to this Court, since to sustain the motion would "end the cause and exculpate the defendants" (261 F. 2d, at p. 40) citing *United States* v. *Hark* (1944), 320 U. S. 531, 536. So, in the instant case, if the dismissal of Count One is sustained, that will end the case so far as that Count is concerned and petitioners will be exculpated as to the acts therein alleged.

The decision below is in direct conflict with the decision of the Second Circuit in the *Mersky* case. That conflict should be resolved by the grant of certiorari herein. The problem is manifestly an important one in the administra-

tion of federal criminal law. In the interest both of the United States and of defendants, all doubt, so far as is humanly possible, should be removed as to the court to which appeals lie. A clear statement of the rule by this Court in its consideration of the *Mersky* case and upon grant of certiorari herein would do much to dispel such doubt.

POINT II

Shopping for favorable grand juries should be prohibited.

This being a federal criminal case, this Court has supervisory jurisdiction over the proceedings of the lower courts. *Mesarosh* v. *United States* (1956), 352 U. S. 1, 9. As Mr. Justice FRANKFURTER said, in the leading case of *McNabb* v. *United States* (1943), 318 U. S. 332, at pages 340-341:

> "Judicial supervision of the administration of criminal justice in the Federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force. Moreover, review by this Court of state action expressing its notion of what will best further its own security in the administration of criminal justice demands appropriate respect for the deliberative judgment of a state in so basic an exercise of its jurisdiction. Considerations of large policy in making the necessary accommodations in our Federal system are wholly irrelevant to the formulation and application

> of proper standards for the enforcement of the Federal criminal law in the Federal courts."

We submit that what happened below is incompatible with "civilized standards of procedure" and with "proper standards for the enforcement of the Federal criminal law in the Federal courts". Dade County, Florida, was obviously the logical county in which to seek an indictment upon alleged crimes committed in Dade County against financial institutions having their principal places of business in Dade County, by residents of Dade County. However, after two successive grand juries sitting in Miami, Dade County, had failed to indict, the United States Attorney submitted this complicated case to a third grand jury sitting in Tampa, at the other side of Florida, some two hundred fifty miles away, and having an entirely different complexion as to residents, attitudes and backrounds, and obtained an indictment from it.

Such shopping around for a favorable grand jury should not be tolerated.

In *Costello* v. *United States* (1956), 350 U. S. 359, Mr. Justice BLACK wrote (at p. 362):

> "There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor. The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes."

We submit that the procedure followed below does not represent "a fair method for instituting criminal proceedings".

In *Berger* v. *United States* (1935), 295 U. S. 78, Mr. Justice SUTHERLAND wrote (at p. 88):

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor —indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

It is submitted that in the instant case, the United States Attorney struck a "foul" blow in violation of the duties imposed upon him as above stated.

Petitioners do not claim that where a grand jury fails to indict, the same alleged crime may not be submitted to another grand jury. Many reasons, such as the availability of additional evidence, may justify resubmission, but the instant record shows no such reason. Nor do petitioners claim that a grand jury sitting in Tampa lacked technical jurisdiction to indict for crimes committed against Miami financial institutions. Petitioners' claim is that unwarranted resubmission to a third grand jury, consisting of residents of an entirely different vicinage and community, 250 miles away, is incompatible with the standards of fair

play required of federal officials, and calls for the exercise of this Court's supervisory powers.

POINT III

Counts Two through Ten are insufficient.

In each of these nine counts it is alleged that petitioners, while directors of North Shore Bank, a member of the Federal Reserve System, and while stockholders and directors of Federal Title and Insurance Corporation, misapplied the funds of the Bank by causing it to make a loan to a third corporation wholly owned by Federal Title. It is not alleged that such borrowing corporations had common directors with the Bank.

Each borrowing corporation is described as "a corporation whose stock was wholly owned by the Federal Title and Insurance Corporation and an affiliate of said North Shore Bank within the terms of 12 U. S. C. 221 (a) (b) (3)."

It is not clear from the foregoing whether it is intended to allege that *Federal Title* is an affiliate of the Bank or that the *borrower* is such "affiliate". If the former, it is completely irrelevant, since the loan was not made to Federal Title. If the latter, it is contrary to law, so far as the facts alleged in the indictment disclose.

The term "affiliate" is precisely defined in 12 U. S. C. §221a (b). Three alternative categories are given. The *first* is where the member bank owns stock in the corporation in question. That is not applicable to the instant case, since it is alleged that Federal Title owned all the stock

of the borrower. The *second* category is where a majority of the stockholders of a member bank own stock in the corporation in question. That is equally inapplicable, as there is no allegation in the indictment that Federal Title was a stockholder of North Shore Bank. The *third* category is where the member bank and the corporation in question have common directors. This category makes Federal Title an affiliate of the North Shore Bank, but, in the absence of any allegation as to the directors of the borrowers, it does not make the borrowers affiliates.

In substance, sustaining these counts is a holding that a wholly owned subsidiary of an affiliate is itself an affiliate. This is unwarranted judicial legislation, in the face of the explicit statutory definition, and presents a novel question of federal law, which is of great and practical importance to all banks which are members of the Federal Reserve System.

Even if the borrowers were affiliates, these loans would not be illegal on the facts properly alleged. The limitation on loans to affiliate is described in 12 U. S. C. §371c. Basically, loans to affiliates may not exceed, in the aggregate, 20% of the capital and surplus of the member bank. Nowhere is it alleged what the capital and surplus of North Shore Bank were at the time of the loans.

Each of the counts contains additional conclusory allegations of inadequate security, intent to defraud, nondisclosure, intent to use the borrowed funds to pay the borrowers' debts to Federal Title, and "violation of sound banking practice". Perhaps, had facts showing these conclusions been properly alleged, the counts might have been sufficient. The inadequacy of the allegations in these counts

was demonstrated by Judge Rives, dissenting as to these counts. He wrote as follows (266 F. 2d, at p. 758):

> "Upon timely objection by motion to dismiss, a defendant can insist upon defects and imperfections in an indictment which might be waived or cured if he waited until after verdict. United States v. Williams, 5 Cir., 1953, 202 F. 2d 712, 713; same case 203 F. 2d 572, 573; Vasquez v. United States, 5 Cir., 1956, 229 F. 2d 288, 289; 42 C.J.S. Indictments and Informations, §301; 27 Am. Jur., Indictments and Informations, §187. The mere legal conclusions at the end of the counts (See Clay v. United States, 5 Cir., 1955, 218 F. 2d 483, 486), and the matters alleged only indirectly or impliedly in the clauses which began 'without disclosing that' (United States v. Williams, supra; Robertson v. United States, 5 Cir., 1948, 168 F. 2d 294; United States v. Lamont, D. C. S. D. N.Y. 1955, 18 FRD 27, 30, affirmed 2 Cir., 1956, 236 F. 2d 312; 4 Barron's Federal Practice & Procedure; Rules Edition, §1914, p. 67; 4 Wharton's Criminal Law and Procedure, §1762; 42 C.J.S. Indictments and Informations §99; 27 Am. Jur., Indictments and Informations, §57) should not be considered in determining the sufficiency of the counts on motion to dismiss. Otherwise, the constitutional requirement of indictment by a Grand Jury contained in Amendment 5, and the requirement of Amendment 6 (See United States v. Cruikshank, 1875, 92 U. S. 542, 557, 558, 23 L. Ed. 588) that the accused 'be informed of the nature and cause of the accusation' might be eroded. Such averments as 'without requiring adequate security' and 'at a low rate of interest' are so indefinite as to leave the standard of guilt to the variant views of different juries. Compare United States v. Cohen Grocery Co., D. C. E.D. Mo. 1920, 264 F. 218, 220, affirmed 1921, 255 U.S.

> 81, see pages 89, et seq., 41 S. Ct. 298, 65 L. Ed. 516. Rule 7(c) of the Federal Rules of Criminal Procedure still requires 'a plain, concise and definite written statement of the essential facts constituting the offense charged.' If we eliminate from counts two through ten the legal conclusions, the indirect expressions and implied allegations, and the averments of matters of opinion, sufficient plain and definite statements of fact are not left to constitute a wilful misapplication within the requirements of United States v. Britton, 1882, 107 U. S. 655, 668, 2 S. Ct. 512, 27 L. Ed. 520; same case, 1883, 108 U. S. 199, 206, 2 S. Ct. 531, 27 L. Ed. 698."

In sustaining the sufficiency of these counts, the majority of the Court of Appeals held, in effect, that directors and officers of banks which are members of the Federal Reserve System may be criminally prosecuted if they cause their banks to make loans to subsidiaries of the members' affiliates, where the United States Attorney can find a grand jury willing to describe the loan as being "in violation of sound banking practice", "at a low rate of interest", etc. This presents a serious question of federal law not heretofore decided and of great importance to the conduct of federal banks.

Finally, it must be pointed out that in holding these counts sufficient the majority below held that the acts alleged constituted misapplication rather than maladministration, which would appear to be contrary to the decision of this Court, in *United States* v. *Britton, supra*, 108 U. S. 193. There this Court held that it was not criminal misapplication for the president of a bank, who was a director thereof, to procure the discount by the bank of his own note knowing that both he and the indorser were insolvent, and to use the

proceeds for his own benefits. The instant counts, even accepting the conclusory allegations at face value, charge no more than that petitioners caused North Shore Bank to make loans which would redound to the benefit of Federal Title, in which petitioners were interested. This is a far weaker situation than that in the *Britton* case, and the decision below appears contrary to that of this Court therein.

POINT IV

Counts Eleven and Twelve are insufficient.

Count Eleven charges petitioner Becker with having made a false report concerning Miami Beach Federal Savings and Loan Association to an examiner of the Home Loan Bank Board, a constituent agency of the Housing and Home Finance Agency, a Federal agency, with intent to deceive such examiner. Count Twelve is substantially the same except that the examiner therein alleged to have been deceived is described as representing the Federal Home Loan Bank Board, also a Federal agency. Each of these counts purports to allege a violation of 18 U. S. C. §1006.

We respectfully submit that an analysis of that section shows that it is not a violation thereof to make a false report with intent to deceive a representative of a Federal agency which is not specified therein. None of the agencies mentioned in these counts is specified in the statute. Therefore these counts do not charge a violation of §1006.

So far as pertinent, §1006 provides that "Whoever being an officer, agent or employee of" certain named Federal agencies and certain described private financial insti-

tutions, "with intent to *defraud* any such institution or any other company, body politic or corporate, or any individual, or to *deceive* any officer, auditor, examiner or agent of any such institution *or of department* [*sic*] or agency of the United States, makes any false entry in any book, report or statement of or to any such institution . . . shall be fined not more than $10,000, or imprisoned not more than five years, or both". (Emphasis supplied).

It is clear from the foregoing that the statute makes a distinction between an intent to "defraud" and an intent to "deceive".* In the case of an intent to *defraud*, the statute is satisfied if anyone at all—any individual, any private corporation or any governmental agency—is the victim, whereas in the case of an intent to *deceive*, to constitute a crime the victim must fall in the restricted group of "any officer, auditor, examiner or agent of any *such* institution, or of department or agency of the United States". Since in the instant counts only an intent to deceive—and not an intent to defraud—is charged, the counts do not charge a crime unless the alleged victims come within such restricted group.

It is clear what is meant by "any such institution"—to wit, any of the private financial institutions described in the opening language of the section. The alleged victims were representatives not of any private institution but of Federal agencies not specified in §1006. Accordingly, the sufficiency of these counts depends on a construction of

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* The two words are, of course, not synonymous. "*Defraud*" means the causing of monetary loss through *deceit*. "Deceit" is the mere naked misrepresentation absent resultant loss. (See, *e.g.* "Webster's New Collegiate Dictionary" [1956], p. 217: "*defraud* * * * to deprive of some right, interest of property *by deceit*.")

the awkward and ambiguous phrase "of department or agency of the United States". Was this a mere scrivener's error? If so, it is odd that it has never been corrected, although the section has been often reexamined. On three occasions there have been enactments of amendments to the section; none of them made any change in the phrase in question (May 24, 1949, c. 139, §20, 63 Stat. 92; July 29, 1956, c. 773, §2, 70 Stat. 714; August 21, 1958, Pub. L. 86-699, Tit. VII, §704, 72 Stat. 698.)

This phrase can only be made intelligible by inserting either the word "any" or the words "any such" before the word "department". If the word "any" is inserted, these counts are sufficient. Alternatively, if the words "any such" are added, the counts are insufficient, for the victims of the alleged deception are described as employees of agencies not listed in §1006, and therefore not coming within the phrase "of [any such] department or agency".

We submit that for at least three reasons the correct construction is the latter alternative, to wit, that the phrase should be interpreted as if it read "of *any such* department or agency":

1. The doctrine that, in case of ambiguity, criminal statutes must be construed so as to apply the more restricted meaning. (*Ladner* v. *United States* [1958], 358 U. S. 169, 177-8, and cases cited.)

2. The doctrine of *noscitur a sociis*. The phrase immediately preceding the crucial one is "of any such institution". The crucial phrase should be similarly construed.

3. The general scheme of the statute. As pointed out above, such scheme is to make a crime of intent to *defraud*

any one, but apparently not to prohibit an intent to *deceive* any one outside of a restricted group.

The correct construction of §1006 thus presents an important question of federal law which should be passed upon by this Court.

POINT V

Counts Thirteen through Seventeen are insufficient.

Each of these counts purports to allege a criminal misapplication in violation of 18 U. S. C. §657 in that petitioners as directors of Miami Beach Federal Savings and Loan Association approved specified construction loans on the security of real estate which was subject to purchase money mortgages not disclosed to the Association, "thereby causing the security of said Association to be inferior and not a first lien as required by statute" (36, 38, 40, 42, 44). Presumably the statute referred to is 12 U. S. C. §1464(c) which requires loans by federal savings and loan associations to be "on the security of first liens."

Since the purchase money mortgages were not "disclosed", it must be assumed they were not recorded. In any event, it is not alleged that they were recorded. Under the law of Florida, as under the law of most jurisdictions, an unrecorded mortgage is not senior to a mortgage given to a subsequent *bona fide* lender without notice. (Fla. Stats. [1957] §695.01; *Van Espoel Real Estate Co.* v. *Sarasota Milk Co.* [1930], 100 Fla. 438.) It is specifically alleged that the Association had no notice of the purchase money mortgages. Accordingly, it follows, as

Judge Rives pointed out below, (266 F. 2d, at p. 759), that the purchase money mortgages did not prevent the Association from having first liens as its security.

We submit that the decision of the majority below that these counts are sufficient solely because they "sufficiently allege the misapplication of funds of a savings and loan association by the investment in mortgages which were not first liens" (226 F. 2d, at p. 759), is clearly erroneous. State law must determine what are "first liens" on property.* Any other rule would subject officers of federal savings and loan associations to the hazard of being charged with illegal acts because of liens unknown to them and not granted priority under local law.

The instant situation is analagous to that under Federal tax statutes. There, we find that:

> "State law creates legal interest and rights. The federal revenue acts designate what interests or rights, so designated, shall be taxed." (*Morgan* v. *Commissioner* [1940], 309 U. S. 78, 80.)

Similarly, it is Florida law which creates first liens, and the federal law, 1464(c), authorizes loans on the security thereof.

We submit that the decision of the majority below presents an important question of federal law not heretofore passed upon by this Court.

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* Except, of course, in the case of a valid federal statute granting priority, and there is no such statute here.

POINT VI

Counts Eighteen through Twenty-one are insufficient.

Each of these counts charges petitioners with participation indirectly, through Federal Title, in an undisclosed manner, in a portion of a loan made by Miami Beach Federal Savings and Loan Association to named borrowers whose connection with petitioners is similarly undisclosed, in claimed violation of 18 U. S. C. §1006.

Sustaining these counts presents an important question of federal law. §1006 was enacted as a consolidation of provisions of eleven different statutes. The original constituent statute applicable to federal savings and loan associations, 12 U. S. C. §1467(c), 48 Stat. 734, did not previously prohibit participation by officers in loans. Some of the other constituent statutes applicable to other types of financial organizations, did contain such a prohibition. The Reviser's Note said with reference to 18 U. S. C. §657 and 1006:

> "Each revised section condenses and simplifies the constituent provisions *without change of substance except as herein indicated*" (emphasis supplied).

There is no indication in the Reviser's Note of any intent to make criminal what was not previously unlawful. Accordingly, Congress cannot be presumed to have intended to change the prior-law (*Pyrex Glass Co.* v. *Transmirror Prod. Corp.*, [1957], 353 U. S. 222, 227; cf. *Palermo* v. *United States* [1959], — U. S. —, 3 L. Ed. 2d 1287, 1298), and to have caused participation by officers of federal savings

and loan associations, previously lawful, to become a criminal offense. Were there any doubt as to Congressional intent, this criminal statute would have to be strictly construed in favor of petitioners (*Ladner v. United States*, *supra*, 358 U. S. 169).

The proper interpretation of §1006 in this respect is of great importance to officers and directors of federal savings and loan associations, and persons dealing with them, throughout the country. This Court should explicitly declare whether, despite the Reviser's Note quoted above, such officers and directors are now prohibited from participating in loans.

POINT VII

Count One is insufficient.

We have reserved consideration of Count One, the conspiracy count, until after discussion of the substantive counts because most of the allegations of the conspiracy count are repeated in the substantive counts and the specific objections thereto, stated in Points III through VI, *supra*, are largely applicable to Count One. For example, it is alleged in Count One that it was part of the conspiracy to permit North Shore Bank to make loans not permitted by 18 U. S. C. §371(c) (¶9). One of the overt acts alleged, and the only one relevant to this part of the alleged conspiracy, was the approval of a loan by North Shore Bank to Austin-Scott, Inc. (12-13). Loans by North Shore Bank to Austin-Scott, Inc., were the subject of Counts Two and Six. We believe that we have shown in Point III, *supra*, that such loans were not prohibited by 12 U. S. C. §371(c). In con-

sidering Count One, a charge of conspiracy to violate 18 U. S. C. §§656, 657 and 1006, it should be noted that in *United States* v. *Britton*, *supra*, 108 U. S. 199, it was held that an indictment charging a conspiracy to violate a predecessor of §656 must show that the acts by means of which the defendants sought to accomplish the conspiracy constituted criminal misapplication and not mere maladministration. We have endeavored to show in Points III through VI, *supra*, that this requirement has not been accomplished insofar as the allegations of Count One reiterated in the substantive counts are concerned. Accordingly, there is no need to reiterate here what has been said in Points III through VI, *supra*, and this Point will be limited to those portions of Count One not already discussed.

It is alleged in the first subparagraph (a) of Count One that the conspirators misapplied bank funds by depriving the banks thereof "during the period that the said . . . funds . . . were beyond the control of the said banks . . ." (7). Similar allegations are made in the succeeding subparagraph, and in the paragraphs beginning at the middle of page 9 and the top of page 10 of the record. It is apparent from other allegations of Court One that this is claimed to have been accomplished by petitioners by causing the financial institutions in question to make loans. It is not alleged that these loans were without interest or that there was any ultimate loss. The question thus presented is whether a bank is deprived of the use of money when it makes a loan at interest, within the meaning of a statute making it criminal to misapply bank funds. The question must be answered in the negative, since one of the principal functions of a bank is to lend at interest, and while money

is so loaned the bank is actually *using* the money, rather than being deprived of it.

In *United States v. Matsinger* (C. A. 3d Cir. 1951), 191 F. 2d 1014, it was held that a conviction under a predecessor of 18 U. S. C. 656, could not be sustained in the absence of a finding by the jury, following appropriate instructions, that the bank did not intend to make a loan of the funds defendant was accused of having withdrawn. In the instant case, loans are affirmatively alleged to have been the manner by which the funds were withdrawn, and accordingly Count One is insufficient to charge a violation of 18 U. S. C. §656.

It is repeatedly alleged in Count One that parts of the conspiracy were to cause Miami Beach Federal Savings and Loan Association to make loans to builders on property in which petitioners had financial interests (8-11). The conspiracy is alleged to have continued to December 31, 1956 (6). All the overt acts are alleged to have occurred on or before February 23, 1956 (12-13). It is therefore significant to note that on October 1, 1956 the Federal Home Loan Bank Board recommended to the Senate Committee on Banking and Currency the enactment of legislation to prohibit such activity. *Study of Banking Laws: Legislative Recommendations of the Federal Supervisory Agencies to the Committee on Banking and Currency, United States Senate*, (Government Printing Office, 1956) pp. 147, *et seq.* The following was the recommendation (*id.*, at p. 148):

> "Relationships between Savings and Loan Associations and Affiliates.
>
> It is suggested that the most serious consideration be given to the question of amending the Federal

Home Loan Bank Act, the Home Owners' Loan Act of 1933, and Title IV of the National Housing Act, or such of them as may be necessary, so that the Federal Home Loan Bank Board may have express power to make rules and regulations with respect to the relationships of and business transactions between members of the Federal home loan banks, and institutions the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, on the one hand, and individuals, corporations, and organizations that are 'affiliates' of such institutions. *The need for such specific statutory authority is necessary because of the indications of instances of self-dealing on the part of such affiliated individuals and organizations in transactions and relationships with savings and loan institutions with which they are affiliated.*" (Emphasis supplied)

The conclusion in inevitable that in the view of the government agency charged with the supervision of federal savings and loan associations (See 12 U. S. C. §§1462[a], 1464[a]), such activities were not theretofore illegal. In the recent case of *United States* v. *Atlantic Refining Co.* (1959), — U. S. —, 3 L. Ed. 2d 1054, 1057, Mr. Justice. BLACK quoted from *Fawcus Machinery Company* v. *United States* (1931), 282 U. S. 375, as follows (at p. 378):

> "contemporaneous construction by those charged with the administration of the act . . . are . . . entitled to respectful consideration, and will not be overruled except for weighty reasons."

The sustaining of Count One by the court below is contrary to this administrative interpretation. The importance of resolving this question of federal law is manifest.

It is submitted that for the reasons stated in Points III through VII inclusive, Count One is invalid.

CONCLUSION

Upon the foregoing grounds, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of District Court

Filed, Miami, Fla., July 3, 1958. Julian A. Blake, Clerk.

[TITLE OMITTED]

This cause, coming on to be heard, was submitted upon the several Motions filed in behalf of each defendant, respectively.

Grounds of the Motions attacking the regularity of proceedings before a Grand Jury of the Tampa Division of this District, resulting in the return of the instant indictment, after a Grand Jury of the Miami Division had preempted the investigation of accusations against these defendants, are without legal merit. United States v. Thompson, 251 U. S. 407; Seadlund v. United States, 97 F. (2d) 742.

Assuming, arguendo, that the indictment herein was returned by the Tampa Grand Jury after hurried and superficial deliberation upon hearsay evidence, this Court may not dismiss the indictment because it was not supported by adequate or competent evidence. Costello v. United States, 350 U. S. 359.

As previously indicated in the course of oral arguments, the Court is of the opinion that unintentionally and inadvertently, the Grand Jury, by re-alleging each of the allegations of paragraphs 1 through 14 of the first count of the

indictment imported into the subsequent substantive counts (two through twenty-one) dual charges of a conspiracy and the violation of a statute creating a substantive offense. Because of duplicity each of such counts is subject to the motion to dismiss.

The conspiracy count (count one) presents some difficulty. The first two statutory criminal offenses which the defendants are alleged to have conspired to commit are those defined by 18 U. S. C. A. Sections 656 and 657. The language of each statute was followed precisely in charging the defendants with a conspiracy "to wilfully misapply and wilfully cause to be misapplied moneys," etc. of the named banks,— "With intent to injure and defraud the said banks."

Recognizing that the phrases "to wilfully misapply" and "wilfully cause to be misapplied" are generic terms having no settled, technical meaning, United States v. Cawthon, 125 F. Supp. 419, the Grand Jury proceeded to spell out the quo modo of misapplication.

It is the Court's opinion that the Grand Jury fell into the error of supposing that any use or disposition of the moneys or funds of a "National" or "Member bank" in any manner or for any purpose proscribed by the Federal Reserve Act, as amended, and more particularly by the provisions of 12 U. S. C. A. Sections 371 and 371c, constitutes a criminal offense. These sections do not of themselves create any offense against the United States. Therefore, on the authority of United States v. Britton, 108 U. S. 199, the alleged acts of defendants in violations of these sections do not amount to criminal misapplication of moneys or

funds, although they may raise the question of maladministration.

Consistent with the foregoing views, briefly expressed it is ordered, adjudged and decreed by the Court that the indictment in Criminal Case No. 10,529-M-Cr. against Baron DeHirsch Meyer, Leonard L. Abess, W. George Kennedy and Sam R. Becker, be, and the same is hereby, Dismissed as to each defendant.

DONE and ORDERED in chambers at Miami, Florida this 3rd day of July, 1958.

/s/ SEYBOURN H. LYNNE
United States District Judge
By Designation

APPENDIX B

Opinion of United States Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 17371

UNITED STATES OF AMERICA,

Appellant,

versus

BARON DEHIRSCH MEYER, LEONARD L. ABESS, W. GEORGE KENNEDY and SAM R. BECKER,

Appellees.

Appeal from the United States District Court for the Southern District of Florida.

(May 5, 1959.)

Before RIVES, TUTTLE and JONES, Circuit Judges.

RIVES, Circuit Judge: This appeal is from a judgment sustaining a motion to dismiss an indictment of twenty-one counts, which occupy forty-seven pages of the printed record.

Appendix B

Count one of the indictment is drawn under the general conspiracy statute, Title 18, United States Code, Section 371, proscribing a conspiracy "either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose." It charges that the four named defendants together with Nathaniel B. Elkins, named as co-conspirator but not defendant, conspired to violate Title 18, Sections 656, 657, and 1006 of the United States Code in the manner and by the means set forth in the count.

Section 656 of Title 18 makes it a criminal offense for an officer, director or agent of a Federal Reserve bank, member bank, national bank or insured bank to embezzle, abstract, purloin or *wilfully misapply* any of the moneys, funds or credits of such bank. Section 657 proscribes the like offense when committed against an institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation. Section 1006 makes criminal the act of an officer, agent or employee who, with intent to defraud any such institution or to deceive any auditor or examiner or agency of the United States, makes any false entry in any book, report or statement of or to any such institution, or who, with intent to defraud the United States or any agency thereof, participates or shares in or receives directly or indirectly any money, profit, property or benefits through any transaction, loan, commission, contract or any other act of such institution.

Substantially following the language of those three sections, count one describes the banks and financial institutions and the positions in such banks and institutions held

by each of the four defendants, and charges them and the co-conspirator with conspiring:

"(a) to wilfully misapply and wilfully cause to be misapplied moneys, funds and credits of the Industrial Savings Bank, the Industrial National Bank and North Shore Bank to the use, benefit and advantage of the said defendants so that the said moneys, funds and credits would be withdrawn from and lost to the said banks during the period that the said moneys, funds and credits were beyond the control of the said banks, with intent to injure and defraud the said banks;

"(b) to wilfully misapply and wilfully cause to be misapplied moneys, funds and credits of the said Miami Beach Federal Savings and Loan Association to the use, benefit and advantage of the said defendants so that the said moneys, funds and credits would be withdrawn from and lost to the said Miami Beach Federal Savings and Loan Association during the period that the said moneys, funds and credits were beyond the control of the said Association, with intent to injure and defraud the said Miami Beach Federal Savings and Loan Association;

"(c) to make and cause to be made false entries in the books and statements of the Miami Beach Federal Savings and Loan Association and to make and cause to be made material false statments in the reports of the said Association with intent to defraud the said Miami Beach Federal Savings and Loan Association and to deceive the officers, auditors, examiners and agents of the Home Loan Bank Board and the Federal Home Loan Bank Board, Departments and Agencies of the United States of America;

> "(d) to participate and share in and receive directly and indirectly money, profits, property and benefits through transactions and loans of the said Miami Beach Federal Savings and Loan Association, with the intent to injure and defraud the Federal Savings and Loan Insurance Corporation and Miami Beach Federal Savings and Loan Association."

Those allegations are followed by a paragraph which contains the count's only reference to Sections 371 or 371c mentioned by the district court in assigning its reasons for dismissing count one, and which paragraph is therefore quoted:

> "That it was a further part of the said conspiracy for the defendants, who maintained control over the operations of the North Shore Bank to knowingly and wilfully allow and permit the said institution to lend money to the corporations named in paragraphs 5, 6 and 7 herein in a manner and means not permitted under the Federal Banking Laws, to wit, Title 12, United States Code, Section 371(c), in that such loans would not be secured by the collateral required by that section; moreover that such loans would be caused to be made, without disclosing to said bank that said loans involved no bonafide transactions of the said borrower, but that said loans would be used for the purpose of temporarily repaying loans to Federal Title and Insurance Corporation in order temporarily to improve the financial position of said corporation, and without disclosing that the proceeds of said loans were to be converted to the use of the defendants through Federal Title and Insurance Corporation."

Appendix B

As would be gathered from that reference to Title 12, United States Code, Section 371(c) it prescribes the kind of collateral which must secure a loan or extension of credit from a member bank to one of its affiliates. Violation of that section is not, however, made a criminal offense.

The paragraph last quoted is followed by four other paragraphs each, like the quoted paragraph, beginning with the words, "That it was a further part of said conspiracy . . ." To facilitate an understanding of this opinion, we quote the opening clauses of each of those four paragraphs:

> "That it was a further part of the said conspiracy for the defendants who maintained control of the said Industrial National Bank, North Shore Bank and Miami Beach Federal Savings and Loan Association to knowingly and wilfully allow and permit the said financial institutions to lend money to builders who were engaged in construction work on properties upon which the defendants had a financial interest. . . .
>
> "That it was a further part of the said conspiracy for the defendants, acting through one of the corporations named in paragraphs 5, 6 or 7,[1] to cause one of those corporations and or builders to borrow

[1] Paragraphs 6 and 7 name six corporations, the sole stockholder of which is Federal Title and Insurance Corporation, and two corporations 90% of the stock of which is owned by Federal Title & Insurance Corporation. Paragraph 5 further alleges: "that a majority of the Board of Directors of said Federal Title and Insurance Corporation from September 4, 1952, through December 31, 1956, consisted of Abess, Meyer and Kennedy, who also maintained control over the corporations named in Paragraphs 6 and 7 hereinafter set forth."

funds from Industrial Savings Bank, Industrial National Bank, North Shore Bank and Miama Beach Federal Savings and Loan Association, which funds would be used by the said defendants for their own personal use and gain . . .

"That it was a further part of the said conspiracy to make and cause to be made false entries in the books, reports and statements of the Miami Beach Federal Savings and Loan Association in that the said defendants would have the responsibility and duty of approving applications for construction loans from Miami Beach Federal Savings and Loan Association and would knowingly and wilfully fail to disclose to the Miami Beach Federal Savings and Loan Association on such applications that there was in existence an unrecorded purchase money mortgage from the applicant for construction loans to one of the corporations named in paragraphs 5, 6 or 7 herein . . .

"That it was a further part of the said conspiracy for the defendants to participate and share in and receive directly and indirectly moneys, profits, property and benefits to transactions and loans of the Miami Beach Federal Savings and Loan Association wherein the said defendants approved and caused to be approved loans to builders from Miami Beach Federal Savings and Loan Association upon property in which the defendants had and which the defendants would have a financial interest. . . ."

Count one closes with the averment of the commission of certain overt acts in furtherance of the alleged conspiracy.

Appendix B

The district court expressed its reasons for sustaining the motion to dismiss count one as follows:

> "The conspiracy count (count one) presents some difficulty. The first two statutory criminal offenses which the defendants are alleged to have conspired to commit are those defined by 18 U.S.C.A. Sections 656 and 657. The language of each statute was followed precisely in charging the defendants with a conspiracy 'to wilfully misapply and wilfully cause to be misapplied moneys,' etc. of the named banks, —'with intent to injure and defraud the said banks.'
>
> "Recognizing that the phrases 'to wilfully misapply' and 'wilfully cause to be misapplied' are generic terms having no settled, technical meaning, United States v. Cawthon, 125 F. Supp. 419, the Grand Jury proceeded to spell out the quo modo of misapplication.
>
> "It is the Court's opinion that the Grand Jury fell into the error of supposing that any use or disposition of the moneys or funds of a 'National' or 'Member bank' in any manner or for any purpose proscribed by the Federal Reserve Act, as amended, and more particularly by the provisions of 12 U.S.C.A. Sections 371 and 371c, constitutes a criminal offense. These sections do not of themselves create any offense against the United States. Therefore, on the authority of United States v. Britton, 108 U. S. 199, the alleged acts of defendants in violations of these sections do not amount to criminal misapplication of moneys or funds, although they may raise the question of maladministration."

At the outset we are confronted with a question of jurisdiction, that is whether the appeal from the judgment dis-

missing count one is properly taken to this Court or should have been taken direct to the Supreme Court of the United States under the Criminal Appeals Act, Title 18, United States Code, Section 3731. The original Criminal Appeals Act provided for appeals by the United States directly to the Supreme Court from a judgment dismissing an indictment or any count thereof where the judgment was based upon the invalidity or construction of the statute upon which the indictment or count was founded, or where the judgment sustained a motion in bar before the defendant had been put in jeopardy. In 1942, the Act was amended to confer jurisdiction on the courts of appeals in such cases "except where a direct appeal to the Supreme Court of the United States is provided by this section."[2] The distinction is that such an appeal involving a matter of substance, the validity or construction of the statute on which the count is founded, or a motion in bar, goes to the Supreme Court; whereas, an appeal involving a matter of procedure or question of pleading goes to the court of appeals.[3] If the district court held that the count, not merely because of some deficiency in pleading but with respect to the substance of the charge, does not allege a violation of the statutes upon which it is founded, then the

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[2] The original act is quoted in United States v. Borden Co., 1939, 308 U. S. 188, 192, footnote 1. The purpose and legislative history of the 1942 amendment conferring jurisdiction on the courts of appeals are recounted in United States v. Swift & Co., 1943, 318 U. S. 442, 444, 445.

[3] Moore's Commentary on the United States Judicial Code, pp. 483, 484.

appeal goes direct to the Supreme Court.[4] If the district court based its decision on a mere defect in pleading, then this Court has jurisdiction of the appeal.

Thus, solution of the jurisdictional question requires us to determine the basis of the district court's judgment. The difficulty which we have encountered prompts us to repeat the wise suggestion of Mr. Justice Jackson, in his concurring opinion in *United States v. Swift & Co.*, 1943, 318 U. S. 442, 446:

> ". . . In connection with the difficult problems that come up as a result of a dual appeal, we would be greatly aided if the District Courts in dismissing an indictment would indicate in the order the ground, and, if more than one, would separately state and number them. I am confident that a request from the Government to do so would generally be granted and that to do so would be of assistance to the Government in taking, and to us in passing on, appeals."

In urging that the appeal should have been taken directly to the Supreme Court, the appellees emphasize the concluding sentence of the district court's reasoning, which we have heretofore quoted in full. Read in context, the meaning of that sentence depends upon the words "these sections," and the sections referred to are Sections 371 and

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[4] See, United States v. Keitel, 1908, 211 U. S. 370, 385; United States v. Corbett, 1909, 215 U. S. 233, 237; United States v. Heinze, 1910, 218 U. S. 532, 540; United States v. Patten, 1913, 226 U. S. 525, 535; United States v. Birdsall, 1914, 233 U. S. 223, 230; United States v. Nixon, 1914, 235 U. S. 231, 235, 236; United States v. Wayne Pump Co., 1942, 317 U. S. 200, 206, 207; United States v. Hvass, 1958, 355 U. S. 570, 574.

371c of Title 12, United States Code. Those sections are not among the statutes upon which the count is founded.

The statute upon which a count is founded is "to be determined as a matter of law from the facts therein charged." *United States* v. *Nixon*, 1914, 235 U. S. 231, 235.

> ". . . The statute, at the violation of which the conspiracy is aimed, has been treated as the statute upon which the indictment is founded within the meaning of the Criminal Appeals Act. *United States* v. *Bowman* 260 U. S. 94, 95; *United States* v. *Walter*, 263 U. S. 15, 16, 17. See, also, *United States* v. *Keitel*, 211 U. S. 370, 387." *United States* v. *Kapp*, 1937, 302 U. S. 214, 216.

The Government agrees with the district court that Title 12, United States Code, Sections 371 and 371c do not of themselves create any offense against the United States. If, then, the district court construed only Sections 371 and 371c of Title 12, and its construction of these sections is conceded to be proper, a direct appeal to the Supreme Court would be meaningless, for the Supreme Court's jurisdiction in such cases "is limited to the construction of the statute involved." *United States* v. *Hood*, 1952, 343 U. S. 148, 150; *United States* v. *Petrillo*, 1947, 332 U. S. 1, 5; *United States* v. *Borden Co.*, 1939, 308 U. S. 188, 193.

So also at this late date no substantial question can be raised but that the words "wilfully misapplies" as used in Sections 656 and 657 of Title 18, United States Code, mean a criminal misapplication rather than a mere act of maladministration. *United States* v. *Britton*, 1883, 108

U. S. 199, 206. As said in the earlier *Britton* appeal, 1882, 107 U. S. 655, 668, "it must be a wilful misapplication for the use or benefit of the party charged, or of some person or company other than the association, with intent to injure and defraud the association or some other body corporate or some natural person." An appeal to the Supreme Court is not needed to have repeated this long-settled construction of the term "wilfully misapplies."

The district court in effect held that the single reference to Section 371c of Title 12, United States Code, operated to refute all of the charges of wilful misapplication of moneys, funds and credits. We construe its holding to be in effect procedural, or based on a claimed defect in pleading, rather than upon the construction of any of the statutes upon which the count is founded, and, therefore, conclude that this Court has jurisdiction of the appeal from the dismissal of count one.

Very clearly, the single reference to Section 371c of Title 12, United States Code, does not prevent the count from charging a criminal conspiracy. The several other paragraphs beginning with the words, "That it was a further part of said conspiracy," contain no reference to that section. That the count charges a wilful, criminal misapplication of funds is shown by the definite charge in paragraphs lettered (a) and (b), heretofore quoted, that the misapplication was "to the use, benefit and advantage of the said defendants" and "with intent to injure and defraud the said banks" and, respectively, "the said Miami Beach Federal Savings and Loan Association."

Appendix B

Neither Section 371c of Title 12, United States Code, nor the meaning of the term "wilfully misapplied," has even a remote connection with those parts of the count which charge a conspiracy to violate Section 1006 of Title 18, United States Code. Compare *United States* v. *Britton*, *supra*, 107 U. S. at pp. 663-665.

The appellees insist, however, that the averments of the count are otherwise insufficient to charge a conspiracy to violate Section 1006. The prohibition of false entries by that section is in broad and comprehensive terms. Compare *United States* v. *Britton*, *supra*, 107 U. S. at pp. 663, et seq.; 9 C. J. S., Banks & Banking, Sec. 149(a). Knowingly and wilfully representing that a proposed construction loan was legitimate by *failing* to disclose on a loan application to one of the financial institutions named in Section 1006 an unrecorded mortgage from the applicant to a corporation owned and controlled by the defendants, or by giving a negative answer to some questionnaire, when made with the requisite intent to defraud the lending institution or to deceive the auditors and examiners or a Government agency, would clearly constitute a false entry in a report or statement to the institution.[5]

Appellees complain that the reviser of the 1948 revision of the criminal code combined some eleven sections of the 1940 Code to create Section 1006 and, in so doing, made the "participation" provisions of certain other sections

[5] Appellees miss the point of the fraud and deceit charged when they argue that the unrecorded mortgage must have constituted a lien effectual as to the lending institution. The fraud and deceit charged consisted in the concealing by the defendants of their interest in the transaction.

applicable to federal savings and loan associations, but made no mention in the Revisers' Notes of the fact that the revised section created new criminal offenses. Without stopping to substantiate the details of that contention, it is enough to say that the language of Section 1006 clearly and unmistakably expresses an intention to make the "participation" provisions apply to each kind of institution named in the section; and that the authorities relied on by the Appellees have no application when the intention expressed in the section itself is clear. *Fourco Glass Co.* v. *Transmirra Corp.*, 1957, 353 U. S. 222, 227; *Anderson* v. *Pacific Coast SS Co.*, 1912, 225 U. S. 187, 199.

We find no merit in any of the appellees' criticisms of count one of the indictment, and conclude that the district court erred in sustaining the motion to dismiss said count.

Counts two through twenty-one, inclusive, charge all or certain of the four defendants with substantive violations of one or more of the same sections 656, 657, or 1006 of Title 18, United States Code.

The district court dismissed each of those counts for duplicity, saying:

> "As previously indicated in the course of oral arguments, the Court is of the opinion that unintentionally and inadvertently, the Grand Jury, by realleging each of the allegations of paragraphs 1 through 14 of the first count of the indictment imported into the subsequent substantive counts (two through twenty-one) dual charges of a conspiracy and the violation of a statute creating a substantive offense. Because of duplicity each of such counts is subject to the motion to dismiss."

Appendix B

As the language of Section 3731, Title 18, United States Code, indicates, its application requires that the dismissal of each count of the indictment be considered separately. *United States* v. *Borden Co.*, 1939, 308 U. S. 188, 193. In that case it was held that a direct appeal to the Supreme Court was not provided from a decision dismissing one of the counts held bad upon the ground "that it is defective as a pleading being duplicitous. . . ." Clearly, therefore, this Court has jurisdiction of so much of the appeal as involves the dismissal of the substantive counts, counts two through twenty-one, inclusive.

Paragraph numbered 1 of each of these substantive counts is identical:

> "1. The Grand Jury realleges each of the allegations of Paragraphs 1 through 14 of the first count of this indictment."[6]

The district court construed that paragraph as importing into each of the substantive counts the entire first count of the indictment. If that were the meaning then there was no purpose in particularizing "paragraphs 1 through 14." Clearly, the Grand Jury meant to reallege something less than all of the first count of the indictment.[7] We find our-

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[6] Rule 7, Federal Rules of Criminal Procedure expressly provides that, "Allegations made in one count may be incorporated by reference in another count."

[7] Indeed the district court itself, somewhat paradoxically we think, characterizes its construction of the indictment by the phrase that ". . . unintentionally and inadvertently, the Grand Jury, etc. . . ."

selves in complete agreement with the succinct refutation of the charge of duplicity contained in the Government's brief.[8]

The appellees urge upon us, however, that they are not restricted to sustaining the defect of duplicity but that,

> " . . . It is a rule applicable to appeals in criminal as well as civil cases that 'a successful party in

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[8] "Examination of the indictment reveals that paragraphs one through fourteen of the first count of the indictment set out certain preliminary facts, identifying the financial institutions involved in the case, the federal agencies with which they were affiliated; the positions held by each of the four defendants in such financial institutions, the relationship of certain subsidiary corporations to another corporation, namely, Federal Title and Insurance corporation, and finally in separate paragraphs (11, 12, 13 and 14) the percentage of stock ownership of each of the four defendants in Federal Title and Insurance Corporation. Paragraph 14 of count one consists of a single sentence and a single allegation of fact:

"'14. That from on or about April 27, 1951, and continuing through December 31, 1956, Sam R. Becker owned approximately 7% of the outstanding stock of Federal Title and Insurance Corporation.'

"After Paragraph 14, and separated from it by a double space there come the standard words: 'The Grand Jury further charges.'

"Thereafter there appears the charging portion of the conspiracy count setting forth the time, place, and venue, the statutes involved, the manner and means of the conspiracy and certain overt acts. This portion of count one consists of eight main paragraphs each double spaced and indented from the text above. Some of these paragraphs include lettered sub-paragraphs.

"Counts two through twenty-one each contain an identical first paragraph which in standard form realleges the preliminary facts set forth in paragraphs one through fourteen in Count 1.

"In view of the physical arrangement of the text of count one and the whole indictment, the indentation of paragraphs, the double spacing between paragraphs, the interjection of the familiar phrase 'The Grand Jury further charges' which separates paragraphs 14 and the paragraphs which follow it, the obvious difference in thought content

the District Court may sustain its judgment on any ground that finds support in the record.' *Jaffke* v. *Dunham* (1957), 352 U. S. 280, 281, 77 S. Ct. 307, 308, 1 L. Ed. 2d 314; *United States* v. *Curtiss-Wright Export Corporation* (1936), 299 U. S. 304, 329, 330, 57 S. Ct. 216, 225, 81 L. Ed. 255; *United States* v. *Kahriger* (1953), 345 U. S. 22, 33 (Footnote 14), 73 S. Ct. 510, 516, 97 L. Ed. 754; *Posey* v. *Ten-*

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and subject matter between paragraph 14 and the charging paragraphs below, it is difficult to follow the reasoning of the Court below that the reiteration in each of the subsequent counts of Paragraphs 1-14 of Count one had the force and effect of tacking on to each of the remaining twenty counts the conspiracy count set forth in count one.

"The reiteration of preliminary facts or allegations in subsequent counts of an indictment, as occurred here, is standard practice; it encourages brevity and clarity; it aids in focusing attention on the main thrust of the separate count or cause of action. Such was the intent in the use of this technique in counts two through twenty-one of this indictment.

"

"To hold that the numbered paragraph 14 of count one must of necessity incorporate all of the remaining unnumbered paragraphs of the count ignores the physical arrangements of the pleading, the settled meaning of the word 'paragraph,' and the effect of the statement 'The Grand Jury further charges' which separates paragraphs 1-14 from the remaining content in count one.

"At best the fact that the paragraphs of count one beyond paragraph 14 were not numbered, can only be considered as a technical point. And the strict technical requirements of pleading have been replaced by a liberality of construction permitted by the Federal Rules of Criminal Procedure.

"*Federal Rules of Criminal Procedure 7 and 52a.* (See also Rule 2.) Moreover, the adequacy and sufficiency of indictments can in modern times be considered on the basis of practical, as opposed to technical considerations. *Tagner* v. *U. S.*, 285 U. S. 427, 431; *U. S.* v. *Achtner*, 144 F. 2d 49, 51; *Andres* v. *U. S.*, 215 F. 2d 84, 86-87; *Beard* v. *U. S.*, 82 F. 2d 837, 840; *Johnson* v. *U. S.*, 207 F. 2d 314, 319. (See, also, *U. S.* v. *Debrow*, 1955, 346 U. S. 374, 376.)"

nessee Valley Authority (CCA 5, 1937), 93 F. 2d 726."

We agree with that principle and proceed to examine the other grounds of the motions to dismiss these substantive counts.

Counts two through ten, inclusive, charge substantive violations of Title 18, United States Code, Section 656, against two of the defendants, Meyer and Abess. Count two is typical and we quote its averments in full:

"COUNT TWO

"The Grand Jury further charges:

"1. The Grand Jury realleges each of the allegations of Paragraphs 1 through 14 of the first count of this indictment;

"2. That on or about the 29th day of December, 1954, in Dade County, Southern District of Florida,

"BARON DEHIRSCH MEYER and LEONARD L. ABESS, defendants herein, being then and there members of the Executive Committee, the Loan and Discount Committee and directors of the North Shore Bank, said bank being then and there a state bank authorized and existing under the laws of the State of Florida and insured by the Federal Deposit Insurance Corporation under Certificate No. 16497 and a member of the Federal Reserve System, and said defendants further being stockholders and directors of the Federal Title and Insurance Corporation, the majority directors of said Federal Title and Insurance Corporation being directors of said North Shore Bank, with intent to defraud said North Shore Bank, did wilfully misapply and cause to be

misapplied moneys, funds and credits of and intrusted to the custody and care of said North Shore Bank, in the following manner: the defendants herein caused said North Shore Bank to make a loan and extend credit of $80,000 to Austin-Scott, Inc., a corporation whose stock was wholly owned by the Federal Title and Insurance Corporation and an affiliate of said North Shore Bank within the terms of 12 U.S.C. 221 (a)(b)(3) as the defendants well knew, without requiring adequate security for said loan and credit, without the prior approval of the Board of Directors of said North Shore Bank, at a low rate of interest, without disclosing to said bank the affiliation between the borrower and said bank, without disclosing to said bank that said loan and credit was related to no legitimate transaction engaged in by said borrower, without disclosing to said bank that the loan was to be used and was used by said borrower for the purpose of repaying a loan made by the Federal Title and Insurance Corporation to said borrower so that the financial cash condition of said Federal Title and Insurance Corporation could be temporarily improved, without disclosing to said North Shore Bank that the proceeds of said loan would be and were used by Austin-Scott, Inc. to repay a loan which it had received from its parent corporation, Federal Title & Insurance Corporation, and that the only means by which Austin-Scott, Inc., could repay the unsecured loan from the North Shore Bank would be by obtaining the necessary funds from said Federal Title & Insurance Corporation, all this being done before the Board of Directors of the North Shore Bank approved the loan to Austin-Scott, Inc., without disclosing to said North Shore Bank, the inadequate financial condition of said Austin-Scott, Inc. which

> fact further jeopardized the money, funds and credits of the North Shore Bank, without disclosing to said North Shore Bank that the actual beneficial recipient of the loan and credit was the Federal Title and Insurance Corporation and that the proceeds of the loan were converted to the use of the defendants for their own personal gain through said Federal Title and Insurance Corporation, the entire purpose of said loan transaction being in bad faith, in violation of sound banking practice, brought about only by the influence of said defendants in said North Shore Bank, against the interests of the North Shore Bank and made only to serve the personal interests of said defendants, and calculated to defraud and injure said North Shore Bank; in violation of 18 U.S.C. 656."

A majority of the judges of the panel deciding this case are of the opinion that counts two through ten are adequate to charge violations of 18 U. S. C. 656 and to apprise the defendants of the accusations in such manner as to permit them to prepare their defenses and to protect them against another prosecution on the same charges. The writer thinks that counts two through ten are bad on motion to dismiss, and expresses his views in the marginal footnote.[9]

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[9] RIVES, Circuit Judge, briefly in dissent:

"Upon timely objection by motion to dismiss, a defendant can insist upon defects and imperfections in an indictment which might be waived or cured if he waited until after verdict. United States v. Williams, 5th Cir. 1953, 202 F. 2d 712, 713; same case 203 F. 2d 572, 573; Vasquez v. United States, 5th Cir. 1956, 229 F. 2d 288, 289; 42 C. J. S., Indictments and Informations, §301; 27 Am. Jur., Indictments and Informations, § 187. The mere legal conclusions at the end of the counts (See Clay v. United States, 5th Cir. 1955, 218 F. 2d 483, 486), and the matters alleged only indirectly or impliedly

Appendix B

Counts eleven and twelve charge that the defendant Becker violated Title 18, United States Code, Section 1006 by submitting to an examiner material false reports of the Miami Beach Federal Savings and Loan Association with intent to deceive the examiner. Those counts definitely describe the statements, the particulars of their alleged falsity; and charge that at the time of submitting the reports to the examiner the defendant Becker knew of such falsity. They sufficiently charge each element of the false report offense defined in Section 1006.

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in the clauses which begin "without disclosing that" (United States v. Williams, supra; Robertson v. United States, 5th Cir. 1948, 168 F. 2d 294; United States v. Lamont, S. D. N. Y. 1955, 18 F. R. D. 27, 30, aff'd 2nd Cir. 1956, 236 F. 2d 312; 4 Barron's Federal Practice & Procedure, Rules Edition, §1914, p. 67; 4 Wharton's Criminal Law and Procedure, §1762; 42 C. J. S., Indictments and Information, §99; 27 Am. Jur., Indictments and Informations, §57.) should not be considered in determining the sufficiency of the counts on motion to dismiss. Otherwise, the constitutional requirement of indictment by a Grand Jury contained in Amendment 5, and the requirement of Amendment 6, (See United States v. Cruikshank, 1875, 92 U. S. 542, 557, 558.) that the accused "be informed of the nature and cause of the accusation" might be eroded. Such averments as "without requiring adequate security" and "at a low rate of interest" are so indefinite as to leave the standard of guilt to the variant views of different juries. Compare United States v. Cohen Grocery Co., E. D. Mo. 1920, 264 F. 2d 218, 220, aff'd 1921, 255 U. S. 81, see pages 89, et seq. Rule 7(c) of the Federal Rules of Criminal Procedure still requires "a *plain*, concise and *definite* written statement of the essential *facts* constituting the offense charged." If we eliminate from counts two through ten the legal conclusions, the indirect expressions and implied allegations, and the averments of matters of opinion, sufficient plain and definite statements of facts are not left to constitute a wilful misapplication within the requirements of United States v. Britton, 1882, 107 U. S. 655, 668; same case, 1883, 108 U. S. 199, 206.

Appendix B

Counts thirteen through seventeen, inclusive, charge substantive violations of Title 18, United States Code, Section 657 against all four defendants. The manner of the alleged misapplication of moneys, funds and credits is similarly alleged in each of these counts and, as typical, we quote such averments of count thirteen:

> " . . . the defendants herein did approve a construction loan to Audubon Homes, Inc. in the amount of $547,400 on the security of certain real estate, the defendants then and there well knowing that there was in existence a prior purchase money mortgage on said real estate from Audubon Homes, Inc. to Federal Title and Insurance Corporation, a corporation in which the defendants were directors and had a financial interest, said real estate having been sold to Audubon Homes, Inc. by Federal Title and Insurance Corporation, which purchase money mortgage was not subordinated to said construction loan mortgage held by the Miami Beach Federal Savings and Loan Association, and which purchase money mortgage was not disclosed to the Miami Beach Federal Savings and Loan Association, thereby causing the security of said Association to be inferior and not a first lien as required by Statute to the said purchase money mortgage and jeopardizing the money funds and credits of Miami Beach Federal Savings and Loan Association and to the benefit of said defendants, and further, said loan was made in disregard of the inadequate financial condition of said Audubon Homes, Inc. and under circumstances whereby losses which might result from the construction activities of Audubon Homes, Inc. financed by the aforesaid construction loan would fall first on Miami Beach Fed-

eral Savings and Loan Association, whereas the defendants and corporations in which they held large interests as stockholders would derive large profits in the event the business transactions financed by said loans were successful, the entire purpose of said loan transaction being in violation of sound banking practice, against the interest of said Miami Beach Federal Savings and Loan Association and to the personal interest of said defendants, in bad faith, brought about only because of the influence of said defendants in the Miami Beach Federal Savings and Loan Association, and calculated to injure and defraud the Miami Beach Federal Savings and Loan Association. . . . ".

A majority of the judges of the panel deciding this case are of the belief that counts thirteen to seventeen, inclusive, sufficiently allege the misapplication of funds of a savings and loan association by the investment in mortgages which were not first liens. The writer, believing otherwise, expresses his views in the marginal footnote.[10]

Counts eighteen through twenty-one, inclusive, charge substantive violations of Title 18, United States Code, Sec-

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[10] RIVES, Circuit Judge, briefly in dissent as to the sufficiency of counts thirteen through seventeen:

Supplementing the views stated in footnote 9, the writer would add that the *facts* stated do not support the conclusionary statement "thereby causing the security of said Association to be inferior and not a first lien as required by Statute to the said purchase money mortgage," because it is affirmatively alleged that the purchase money mortgage was not disclosed to the Association, and it is not alleged that the purchase money mortgage was recorded according to law. See Section 695.01, Florida Statutes 1957.

tion 1006 against all four defendants. Count eighteen is typical. It charges that the defendants,

> "'. . . then and there being officers, agents and employees of the Miami Beach Federal Savings and Loan Association, did participate and share in and receive indirectly through Federal Title and Insurance Corporation money, profit, property and benefits, to-wit: the sum of $27,000 in the name of Federal Title and Insurance Corporation, through a loan from Miami Beach Federal Savings and Loan Association to Vivian J. Inc., in the sum of $293,750, with intent to defraud the Miami Beach Federal Savings and Loan Association, in violation of Title 18, United States Code, Section 1006.'"

Each element of the "participation" offense denounced by Section 1006 is plainly, concisely and definitely stated (see Rule 7(c), Federal Rules of Criminal Procedure), the loan is identified, the amount of participation on the part of the defendants described, and the way in which it was received averred, that is, in the name of Federal Title and Insurance Corporation. The district court erred in dismissing counts eighteen through twenty-one, inclusive.

A majority of the judges of the panel deciding this case hold that the district court erred in dismissing each count of the indictment. The writer concurs except as to counts two through ten and thirteen through seventeen. See Footnotes 9 and 10, supra. As to each count of the indictment, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

APPENDIX C

Statutes and Rules Involved

United States Constitution Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger. . . .

United States Constitution Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation. . . .

12 U. S. C. § 221a

(b) Except where otherwise specifically provided, the term "affiliate" shall include any corporation, business trust, association, or other similar organization—

(1) Of which a member bank, directly or indirectly, owns or controls either a majority of the voting shares or more than 50 per centum of the number of shares voted for the election of its directors, trustees, or other persons exercising similar functions at the preceding election, or controls in any manner the election of a majority of its directors, trustees, or other persons exercising similar functions; or

(2) Of which control is held, directly or indirectly, through stockownership or in any other manner, by the shareholders of a member bank who own or control either a majority of the shares of such bank or more than 50 per

centum of the number of shares voted for the election of directors of such bank at the preceding election, or by trustees for the benefit of the shareholders of any such bank; or

(3) Of which a majority of its directors, trustees, or other persons exercising similar functions are directors of any one member bank. . . .

12 U. S. C., §371c

No member bank shall (1) make any loan or any extension of credit to, or purchase securities under repurchase agreement from any of its affiliates, or (2) invest any of its funds in the capital stock, bonds, debentures, or other such obligations of any such affiliate, or (3) accept the capital stock, bonds, debentures, or other such obligations of any such affiliate as collateral security for advances made to any person, partnership, association, or corporation, if, in the case of any such affiliate, the aggregate amount of such loans, extensions of credit, repurchase agreements, investments, and advances against such collateral security will exceed 10 per centum of the capital stock and surplus of such member bank, or if, in the case of all such affiliates, the aggregate amount of such loans, extensions of credits, repurchase agreements, investments, and advances against such collateral security will exceed 20 per centum of the capital stock and surplus of such member bank. . . .

12 U. S. C. 1464(c)

Such associations shall lend their funds only on the security of their shares or on the security of first liens

upon homes or combination of homes and business property within fifty miles of their home office: . . .

18 U. S. C. §371

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U. S. C. §656

Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misap-

plied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank and trust company which has become a member of one of the Federal Reserve banks; and "insured bank" includes any bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation.

18 U. S. C. §657

Whoever being an officer, agent or employee of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, Home Owners' Loan Corporation, Farm Credit Administration, Federal Housing Administration, Federal Farm Mortgage Corporation, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, or any land bank, intermediate credit bank, bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, and whoever, being a receiver of any such institution, or agent or employee of the receiver, embezzles, abstracts, purloins or willfully misapplies any moneys, funds, credits, securities or other things of value

belonging to such institution, or pledged or otherwise intrusted to its care, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount or value embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

18 U. S. C. §1006

Whoever, being an officer, agent or employee of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, Home Owners' Loan Corporation, Farm Credit Administration, Federal Housing Administration, Federal Farm Mortgage Corporation, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, or any land bank, intermediate credit bank, bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, with intent to defraud any such institution or any other company, body politic or corporate, or any individual, or to deceive any officer, auditor, examiner or agent of any such institution or of department or agency of the United States, makes any false entry in any book, report or statement of or to any such institution, or without being duly authorized, draws any order or bill of exchange, makes any acceptance, or issues, puts forth or assigns any note, debenture, bond or other obligation, or draft, bill of exchange, mortgage, judgment, or decree, or,

with intent to defraud the United States or any agency thereof, or any corporation, institution, or association referred to in this section, participates or shares in or receives directly or indirectly any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of any such corporation, institution, or association, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. §3731

An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

Appendix C

An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section.

The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted.

Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be admitted to bail on his own recognizance.

If an appeal shall be taken, pursuant to this section, to the Supreme Court of the United States which, in the opinion of that Court, should have been taken to a court of appeals, the Supreme Court shall remand the case to the court of appeals which shall then have jurisdiction to hear and determine the same as if the appeal had been taken to that court in the first instance.

If an appeal shall be taken pursuant to this section to any court of appeals, which, in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to

the same extent as if an appeal had been taken directly to that Court.

Rule 7(c) Federal Rules of Criminal Procedure.

The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. . . .